was intended by the framers of the provision to refer to the legislature for action the power intended to be conferred upon the mayor of a city or town to remove a member of the police force or fire department, while the suspension of these officers is left entirely in his power without legislative authority or control over his action.

We have no decision by this court helpful in determining the question under consideration. *Arey* v. *Lindsay,* 103 Va. —, 48 S. E. 889; *Oppenheim* v. *Myers,* 99 Va. 582, 39 S. E. 218, and *Burch* v. *Hardwicke,* 30 Gratt. 24, 32 Am. Rep. 640, have no application whatever to this case. Our conclusion is that, reading section 120 of the present Constitution in the light of the surrounding circumstances, the language used clearly indicates that it was the purpose of its framers to refer the subject—the power and control over the police force in the several cities of the state—to the legislature for action, and that said action is not to be construed as self-executing.

The judgment of the corporation court of Newport News must therefore be reversed and annulled, and this court will enter such judgment as that court should have entered.

NOTE.—The decision in the case above seems to be in conflict with *Trigg* v. *State,* 49 Tex. 645, cited in 8 Cyc. 756, where it was held that no legislation was needed to authorize a district judge to remove a county attorney or other county official from office for official misconduct, under a constitutional provision authorizing such removals for offenses prescribed, and others defined by law.

For extended note, see note appended to *Robertson* v. *City of Staunton,* published *ante* in this issue of the REGISTER.

WILLIAMSON V. SOUTHERN RY. CO.

Supreme Court of Appeals of Virginia.

June 15, 1905.

[51 S. E. 195.]

1. RAILROADS—*Action for injuries—Evidence.*—In an action against a railroad for injuries, evidence examined, and *held* insufficient to show that plaintiff at the time of his injury was using the defendant's tracks as a walkway as an invited guest of the defendant or otherwise than as a bare licensee.

2. SAME—*Negligence.*—Where a railroad track has been used as a walkway by the public for many years, and such use is known to the railroad company and its employés, the sole duty of the company to persons whom it may reasonably expect to be on the track is discharged by the use of reasonable care to discover and avoid injuring them.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, sections 1228, 1229, 1235, 1236.]

3. SAME.—A railroad is under no obligation to make preparation in advance for the protection of mere licensees in using its tracks for a walkway, and hence its failure to furnish a light on its engine on a dark night was not negligence as to a licensee using its tracks for a walkway.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, sections 1236, 1261.]

Error to Law and Equity Court of City of Richmond.

Action by James E. Williamson against the Southern Railway Company. Judgment in favor of defendant, and plaintiff brings error. *Affirmed.*

Meredith & Cocke, for plaintiff in error.

Munford, Hunton, Williams & Anderson, for defendant in error.

HARRISON, J.:

This is an action to recover damages for personal injuries alleged to have been caused by the negligence of the defendant company. The damages were assessed by the jury at $1,500, subject to a demurrer to the evidence, which was sustained, and judgment given for the defendant.

The accident which is the subject of inquiry occurred upon that portion of the main line of the defendant which runs along the south bank of James river, at or about its entry of the company's yards in the city of Manchester. A little northwest of the city of Manchester, in James river, is an island called "Belle Isle," upon which is located an iron manufactory. This island is connected with the south bank, or Manchester side, of the river by a railroad bridge built by the defendant company for its use in hauling freight, upon each side of which is provided a walkway for the use of persons going to and from the ironworks. These ironworks and the railroad bridge, connecting them with the main line of the Southern Railway on the Manchester side of the river have been in operation for many years. When the employés from Belle Isle

cross the bridge and reach the south bank of the river they have two routes open to them—one leading away from the railroad and into the city of Manchester, and the other along the right of way of the defendant company into the city. These employés had for many years used both routes, the choice depending upon the point of destination in the city. Those who, for their convenience, adopted the latter route, had always enjoyed its use by the passive acquiescence of the defendant.

The plaintiff had been for "three or four months" an employé of the ironworks on Belle Isle, and on the 27th day of November, 1903, he left the works 15 minutes before 6 o'clock to go to his home. When he reached the south bank of the river he pursued, as was his regular habit, the route along the right of way of the defendant company. He walked on the pathway at the side of the track a distance of about 1,400 feet, but, finding the path rough, he looked and listened to ascertain if a train was approaching, and, being satisfied that no train was coming, he stepped upon the railroad track and walked thereon for a distance of 25 yards, when he looked back and found a work train of the defendant company so close upon him that he could not jump out of the way in time to avoid the injuries complained of. The plaintiff says that it was a very dark night, that the engine was provided with no headlight or lights of any description, and when he looked back it was so dark that he could not see the engine good. He further says that his hearing was poor in one ear, and that it was down grade at that point, which caused the train to run without making much noise.

It is contended by the plaintiff in error that when using the track and right of way of the railroad on the south side of the river as a convenient route to his home he occupied a higher relation to the defendant company than that of licensee, it being insisted that "the defendant so built its bridge with walkways on each side thereof that the workmen on Belle Isle could come across to the Manchester side and use its tracks as their route to and from their homes; that no invitation in a practical way could have been more strongly given; that it is idle to say that the company only built the bridge to get the men to the shore, and that it never meant for them to use the tracks as their route home. The two things, the bridge and the route, were too closely connected for them to be separated with fairness. The old bridge and route had been used

jointly for 50 years, and the new bridge and the route were intended and expected to be used jointly. The use was in fact by invitation."

We have been unable to find any fact or circumstance in the record to support this contention. No relation is disclosed between the defendant and the ironworks other than that of common carrier and shipper, and the defendant can hardly be held to have built its bridge from Belle Isle to the shore for the benefit of the workmen there employed. It was built for the use and the benefit of the railroad company in hauling freight. The construction of the walkways on each side of the bridge was a mere incident, and, while put there for persons to walk on, they served as a proclamation and warning to such persons not to use the track, rather than an invitation to use it. When those using the walkways on either side of the bridge reached the shore, they bore no relation whatever to the defendant company. They were uncontrolled and free to go where, when, and by whatsoever route they pleased. Such of them as chose to follow the right of way of the railroad as a convenient route to their homes, did so voluntarily, and without invitation from the defendant company. On the contrary, 240 feet from where the plaintiff was struck there was a large sign 4 feet square, with the following warning thereon:

"Danger—Beware. The public is notified that these railroad tracks and right of way are no thoroughfare; must be used by trains, and are dangerous for pedestrians, who are warned to use the public streets and keep off these private tracks."

This warning is signed by the general manager of the defendant company. It is set up 10 feet high, and conspicuously in view of the plaintiff every time he passes over the right of way of the defendant in going to his home.

In the light of these facts, our conclusion is that the plaintiff was not using the railroad track on the evening of his injury as the "invited guest" of the defendant company, but was there as a bare licensee.

An action for negligence only lies where there has been a failure to perform some legal duty which the defendant owes to the party injured.

In the case at bar the evidence shows that the right of way of the defendant company at the point where the accident occurred, had been for many years in daily use as a walkway by persons from

Belle Isle, and that this use and the particular hours of such use were well known to the company and its employés. Under these circumstances it was the duty of the company to use reasonable care to discover, and not to injure, persons whom it might reasonably expect to be on its tracks at that point. *Blankenship* v. *C. & O. Ry. Co.,* 94 Va. 449, 27 S. E. 20; *C. & O. Ry. Co.* v. *Rodgers' Adm'x,* 100 Va. 324, 41 S. E. 732.

If the case of *N. & W. Ry. Co.* v. *Wood,* 99 Va. 156, 37 S. E. 846, where the plaintiff was standing on the platform of a freight depot, and was injured by a freight train that ran against the platform, this court said: "Being there as a mere licensee, the defendant did not owe him the duty of maintaining its roadbed, switches, and connected appliances in proper condition for running its trains, or of providing and using proper and safe trucks, couplings, and machinery on its cars, or of properly inspecting the same, or of employing competent servants to manage its trains, or to run them at a safe and proper rate of speed. The general rule being that a bare licensee—that is, one who is permitted by the passive acquiescence of the railroad company to come upon its depot platform for his own purposes, in no way connected with the railroad—is only relieved from the responsibility of being a trespasser, and takes upon himself all the ordinary risks attached to the place and the business carried on there"—citing 2 Shear. & Red. on Neg. sec. 705; *Nichol's Adm'r* v. *W. O. etc. R. Co.,* 83 Va. 102, 5 S. E. 171, 5 Am. St. Rep. 257; *Gillis* v. *Penn. R. R. Co.,* 59 Pa. 129, 98 Am. Dec. 317; *Holland etc.* v. *Sparks,* 92 Ga. 753, 18 S. E. 990.

In the case of *C. & O. Ry. Co.* v. *Rodgers' Adm'x, supra*—a case similar in its facts and circumstances to that under consideration—this court approved an instruction which told the jury that the defendant company did not owe the plaintiff's intestate the duty of blowing its whistle, ringing its bell, running its engines at any particular rate of speed, or having a light on said engines or tender; that if they believed from the evidence that the servants of the defendant in charge of the engine could not, in the exercise of reasonable care, under the circumstances surrounding them at the time, have known of the danger to the plaintiff's decedent in time to avoid the accident, they must find for the defendant; but that if they believed from the evidence that the servants of the defendant in charge of the engine could, in the exercise of reasonable care,

under the circumstances surrounding them at the time, by having a proper lookout, have discovered the danger of the plaintiff in time to avoid the accident, they must find for the plaintiff.

The result of these decisions is that a railroad company owes no duty of prevision to a bare licensee. It is under no obligation to make preparation in advance for his protection. Its sole duty is to use reasonable care to discover, and not to injure, such persons when they may reasonably be expected to be on its tracks at a particular point. As said in Wood's case, *supra,* such a person is only relieved from the responsibility of being a trespasser, and takes upon himself all the ordinary risks attached to the place and the business carried on there. The uncontradicted evidence of the engineer in the present case is that he did keep a lookout, and did not see the plaintiff, who, he says, must have been walking in the middle of the track, where he could not have seen him on account of a curve in the road at that point; that, if the plaintiff had been on the side of the track at the edge of the ties, he could have seen him.

It is earnestly insisted that it was not intended, in the Rodgers case, *supra,* to hold that a railroad company was without fault in running a train on a dark night with no light on its engine, thereby depriving itself of the power to keep such reasonable lookout as the law required; that the declaration in the Rodgers case meant to charge that the failure to have proper lights on the engine was negligence in itself, without regard to whether or not they were necessary for the maintenance of a reasonable lookout; that the evidence bears out this view of the pleading, because it there appears that it was a bright moonlight night, and therefore immaterial whether or not there were lights on the engine; that it would be a strange and striking contradiction, if not a curious absurdity, to announce it to be the duty of a railroad company to keep a reasonable lookout, and at the same time to hold that it could so envelop itself in darkness as to prevent its performance of such clearly stated duty.

The argument of the learned counsel on this point may be reduced to this proposition: that if it is a bright moonlight night the railroad may run its trains without lights on its engines, but if there is no moon, or the moon is obscured so as to make the night dark, it must, for the protection of bare licensees, provide its en-

gines with artificial lights, or be held guilty of a failure to perform a legal duty due to such licensees.

To maintain this view would destroy the established rule that a railroad company is under no duty to make previous preparation for the protection of mere licensees; for, if they must provide lights for their protection on a dark night, it could with equal propriety be urged that on a down grade—which it is here contended so reduced the noise of the train as to destroy its value as notice—the company should be required to substitute other noises as notice of its approach. It could with equal force be contended that its machinery and appliances, other than lights, should be in order, that competent employés should be provided, and that the speed of its trains should be so regulated as to provide for the increased danger of a dark night to the licensee. Many things could be done which would add to the facility and safety with which bare licensees might, for their own convenience, use the private property of the railroad; but enough has been said to indicate how difficult, if not impossible, it would be to ingraft upon the rule mentioned any exception without ignoring the property rights of the railroad company. There is no contradiction in the rule holding that the defendant company must keep a reasonable lookout to avoid injuring bare licensees, and at the same time providing that it is under no obligation to furnish lights for its engines on a dark night for the protection of such persons. There is no obligation upon the defendant to do anything to make the conditions more favorable than the natural surroundings make them. The obligation is not an absolute one to discover the plaintiff, but it is only the duty of using ordinary care to keep a reasonable lookout under the conditions and circumstances existing at the time the point is reached where the licensee may be reasonably expected. This is shown by the instruction approved in the Rodgers case, *supra,* which told the jury that if they believed from the evidence that the servants of the defendant in charge of the engine could not, in the exercise of reasonable care, under the circumstances surrounding them at the time, have known of the danger to the plaintiff's decedent in time to have avoided the accident, they must find for the defendant.

In the case at bar the defendant discharged its duty to the plaintiff when it kept such reasonable lookout at the time as its servants could keep under the conditions then existing, among which

conditions was an absence of the moon, and no artificial light provided to take its place. The darkness, which it is contended imposed upon the defendant the duty of providing lights for the protection of the plaintiff, also enveloped the latter when he stepped from a place of safety on the pathway to the defendant's track, and should have suggested to him the increased danger of his situation. Having reached the conclusion, however, that the defendant company has failed in the performance of no legal duty that it owed the plaintiff, it is not necessary to consider the negligence of the latter.

For these reasons the judgment complained of must be affirmed.

VIRGINIA PASSENGER & POWER CO. *et al.* v. FISHER *et al.*

Supreme Court of Appeals of Virginia.

June 15, 1905.

[51 S. E. 198.]

1. DECREE.—*Appealability—Appointment of receiver.*—A decree of a state court appointing a receiver of property of a corporation, a receiver of which had previously been appointed in the federal court in a suit commenced after the commencement of the suit in the state court, authorizing the receiver to intervene in the other suit, and requests a vacation of the federal order, and a turning over of the property to the receiver of the state court, was an appealable decree, under Code 1904, p. 1776, sec. 3454, authorizing an appeal from a decree requiring a change in the possession of property.

2. APPEAL—*Scope of review.*—On appeal from a decree appointing a receiver of property of a corporation, all decrees and proceedings in the case were open to consideration and review.

CORPORATIONS—*Injury to corporation—Suit by stockholders.*—In order for a stockholder to sue on a cause of action in favor of the corporation, there must have been a demand on the directors or other managing body to institute proceedings, and a refusal so to do, or it must have been reasonably certain that a demand would have been useless.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, sections 791-796.]

4. SAME—*Suit by stockholders—Bill—Allegations—Sufficiency.*—Where the conduct of one controlling the majority of the stock of a corporation constituted a wrong toward the corporation, it was not necessary that a stockholder should apply to the corporation at a meeting of